

No. 13734

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**United States  
Court of Appeals**  
for the Ninth Circuit.

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UNITED STATES OF AMERICA,  
Appellant,  
vs.

THE ALBERTSON COMPANY, a Corporation,  
Appellee.

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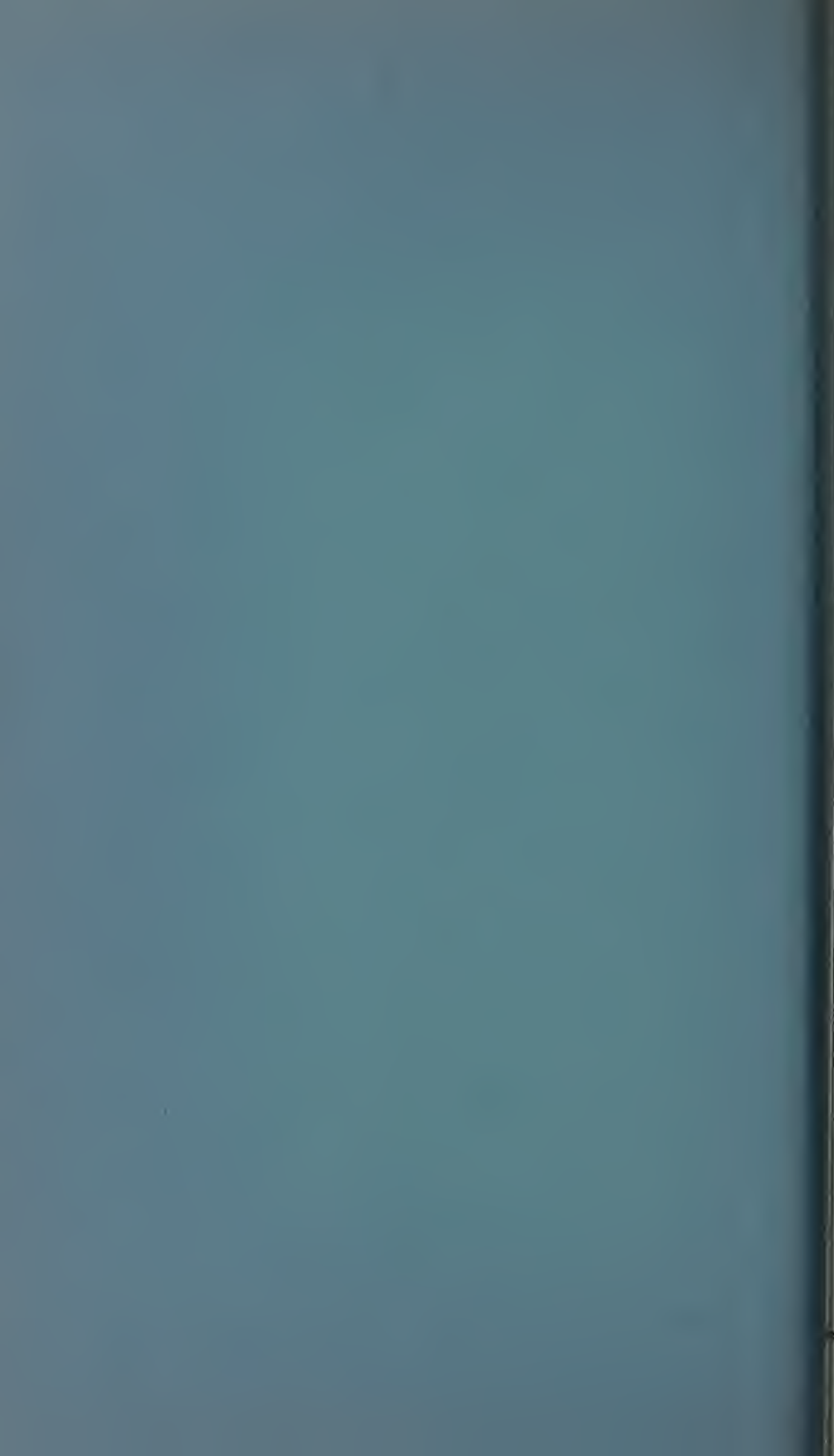
**Transcript of Record**

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**Appeal from the United States District Court for the  
Southern District of California,  
Central Division.**

FILED

MAY 21 1955



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UNITED STATES OF AMERICA,  
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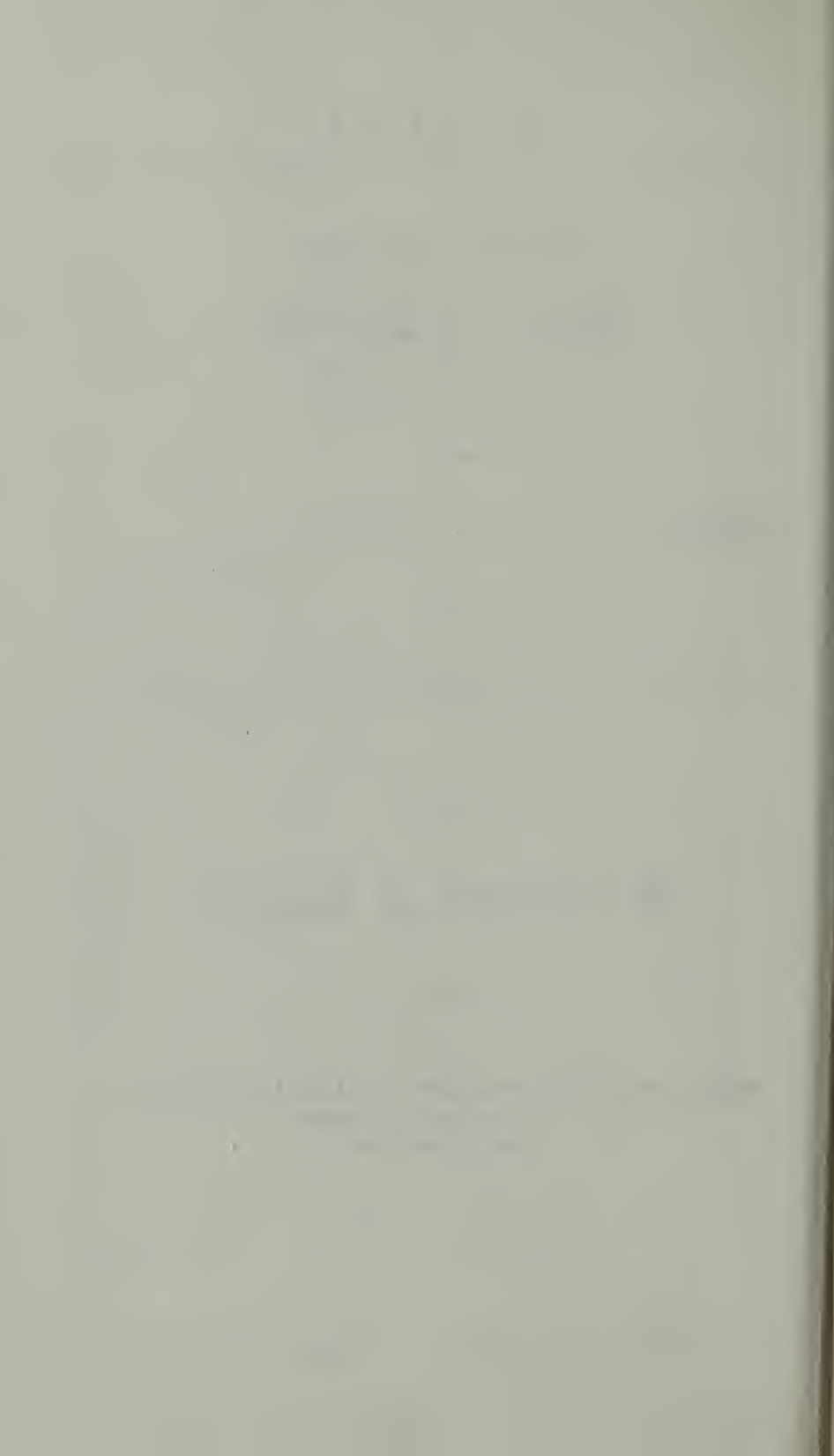
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Transcript of Record

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Appeal from the United States District Court for the  
Southern District of California,  
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## INDEX

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

### For Appellant:

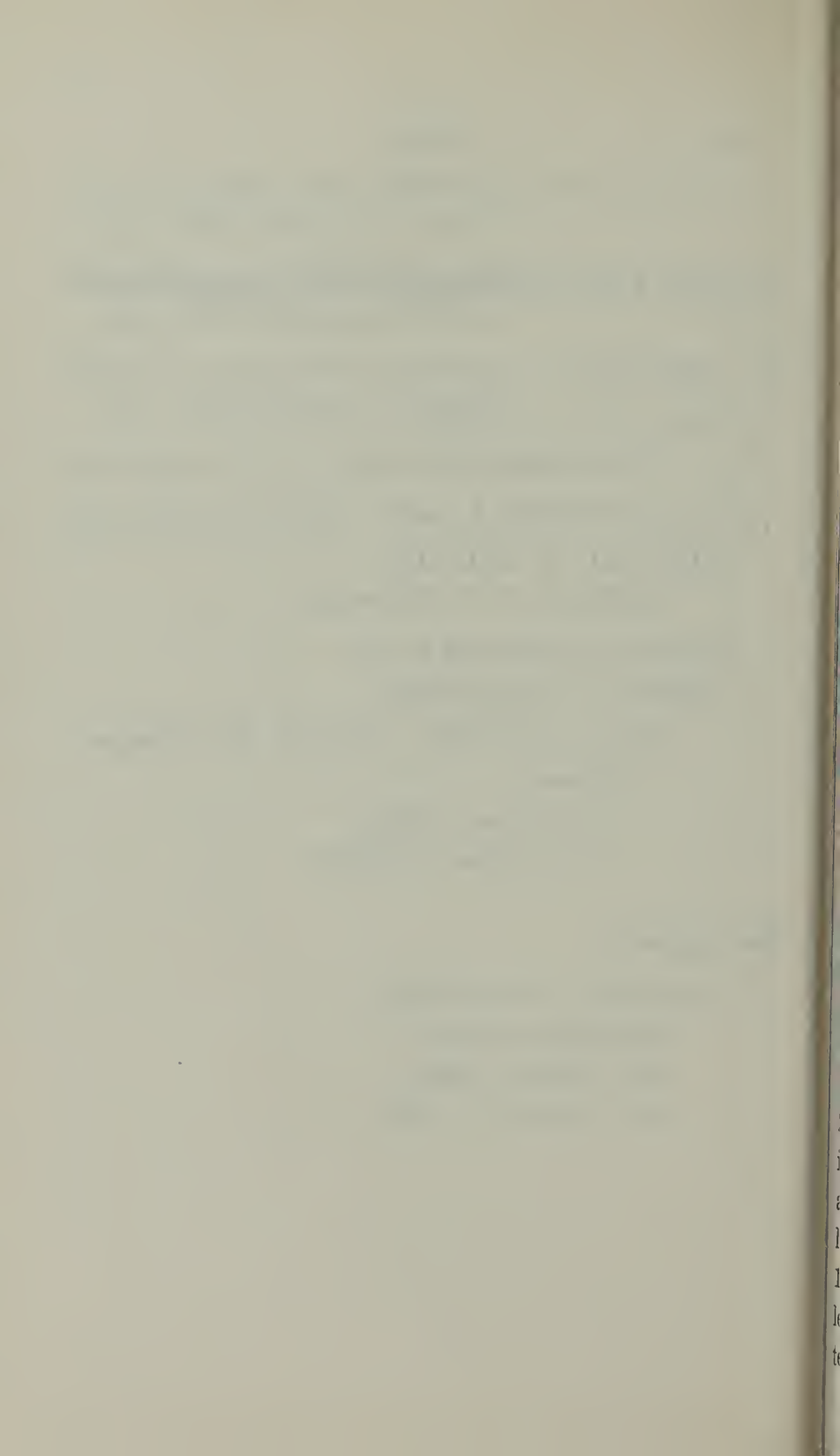
WALTER S. BINNS,  
United States Attorney;

E. H. MITCHELL and  
EDWARD R. McHALE,  
Assistants U. S. Attorney.

EUGENE HARPOLE and  
FRANK W. MAHONEY,  
Special Attorneys, Bureau of Internal  
Revenue,  
600 Federal Bldg.,  
Los Angeles 12, Calif.

### For Appellee:

LATHAM & WATKINS,  
830 Statler Center,  
900 Wilshire Blvd.,  
Los Angeles 17, Calif.





In the District Court of the United States in and  
for the Southern District of California, Central  
Division

No. 11960-PH Civil

THE ALBERTSON COMPANY, a Corporation,  
Plaintiff,

vs.

UNITED STATES OF AMERICA,  
Defendant.

COMPLAINT FOR REFUND OF INCOME  
TAXES AND PERSONAL HOLDING COM-  
PANY SURTAX

Comes now the plaintiff by its attorneys, Latham  
& Watkins, and for a cause of action against the  
defendant, alleges:

I.

Plaintiff is a corporation duly organized and op-  
erating under the laws of the State of California  
and maintains its principal place of business in the  
City of Los Angeles, County of Los Angeles, State  
of California.

II.

This action is filed pursuant to the provisions of  
28 U.S.C.A. Sec. 1346 for the recovery of Federal  
income taxes and personal holding company surtax  
and interest thereon erroneously and illegally col-  
lected from the plaintiff for the calendar years  
1944 and 1945. Said taxes and interest were col-  
lected by Harry C. Westover as Collector of In-  
ternal Revenue for the Sixth Collection District

of [2\*] California, who is no longer in office as such Collector.

### III.

Plaintiff owns and at all times herein mentioned owned, real property in the County of Los Angeles, State of California. During the calendar years 1944 and 1945, plaintiff sold certain parcels of said real property. In computing the adjusted basis for determining gain or loss from the sale of these properties the plaintiff included as a part of the cost of said properties, taxes paid by the plaintiff which were a lien on said properties at the time they were acquired and escrow fees, recording costs and other related expenses paid by the plaintiff as set forth fully in the plaintiff's claims for refund, marked Exhibits "A," "B," and "C" attached hereto.

### IV.

Plaintiff duly filed its Federal income tax return for the calendar year 1944 with the Collector of Internal Revenue for the Sixth Collection District of California and paid in full the tax shown thereon to be due. Deducted from gross income on said return was loss incurred on the sale of said real property during the calendar year 1944, computed in the manner set forth in Paragraph III above.

### V.

Plaintiff also filed its Federal return for personal holding companies for the calendar year 1944 with said Collector of Internal Revenue and paid

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\*Page numbering appearing at foot of page of original Certified Transcript of Record.

in full the tax shown thereon to be due. Undistributed Subchapter A net income shown on said return reflected loss incurred on the sale of said real property during the calendar 1944, computed in the manner set forth in Paragraph III above.

VI.

Said plaintiff likewise filed its Federal income tax return for the calendar year 1945 with said Collector of Internal Revenue and paid in full the tax shown thereon to be due. Included [3] in gross income on said return was income resulting from the gains realized on the sale of said real property during the calendar year 1945, computed in the manner set forth in Paragraph III above.

VII.

Upon examination of said returns the Commissioner of Internal Revenue, acting through the Internal Revenue Agent in Charge, Los Angeles division, determined that the plaintiff could not include said taxes, escrow fees, recording costs and other related expenses as a part of the cost of the properties sold in 1944 and in 1945, and disallowed said taxes, escrow fees, recording costs and other related expenses as part of the cost of said real property.

VIII.

As a result of the determinations as set forth in Paragraph VII above, said Commissioner of Internal Revenue assessed additional income taxes against the plaintiff in the amounts of \$162.01 for the calendar year 1944 and \$1,021.24 for the calen-

dar year 1945; in addition, said Commissioner of Internal Revenue assessed additional personal holding company tax against plaintiff in the amount of \$4,479.70 for the calendar year 1944.

#### IX.

On or about September 16, 1947, the plaintiff paid to said Collector of Internal Revenue all said amounts stated in Paragraph VIII above; the total of said assessments paid being \$5,662.95, together with interest thereon.

#### X.

By reason of said assessments and payments the plaintiff has overpaid its Federal income taxes for the calendar year 1944 by the amount of \$145.63 and its personal holding company tax for the calendar year 1944, by the amount of \$3,264.41; and its Federal incomes taxes for the calendar year 1945 by the amount of \$1,203.67.

#### XI.

On or about September 6, 1949, the plaintiff filed with [4] said Collector of Internal Revenue its claims for the refunds of the overpayment of taxes for the calendar years 1944 and 1945. Copies of said claims are attached hereto as Exhibits "A," "B" and "C," respectively, and by this reference made a part of this complaint.

#### XII.

On or about July 10, 1950, the Commissioner of Internal Revenue mailed to the plaintiff a notice of

disallowance of the aforementioned claims for refund and each of them.

XIII.

The Federal income and personal holding company surtax liability of plaintiff for the calendar year 1944 was not in excess of \$159.25 and \$1,226.24, respectively; and the Federal income tax liability for the calendar year 1945 was not in excess of \$74,126.64. Plaintiff has overpaid its Federal income and personal holding company surtax for the calendar year 1944 and its Federal income taxes for the calendar year 1945, respectively, by the amounts set forth in Paragraph X hereof.

Wherefore, the plaintiff prays that judgment may be entered herein against the defendant as follows:

1. In favor of the plaintiff for \$4,431.28 with interest as provided by law;
2. For costs of suit; and
3. For such other relief as the Court may deem just and proper.

LATHAM & WATKINS,

By /s/ DANA LATHAM,

Attorneys for Plaintiff. [5]

State of California,  
County of Los Angeles—ss.

C. L. Austin, being first duly sworn, deposes and says:

That he is Vice-President of The Albertson Company, a California corporation, plaintiff in the above-entitled action, and as such is authorized to execute this affidavit;

That he has read the foregoing Complaint for Refund of Income Taxes and Personal Holding Company Surtax and knows the contents thereof; and

That the same is true to the best of his knowledge and belief.

/s/ C. L. AUSTIN.

Subscribed and sworn to before me this 19th day of July, 1950.

[Seal] /s/ FLORENCE L. BIGELOW,  
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Dec. 25, 1952. [6]

## EXHIBIT A

Form 843

Treasury Department

Internal Revenue Service

(Revised July 1947)

### Claim

To Be Filed With the Collector Where Assessment  
Was Made or Tax Paid

Collector's Stamp (Date Received) [Blank]

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse.

- Refund of Taxes Illegally, Erroneously, or Excessively Collected.
- Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

State of California,  
 County of Los Angeles—ss.

Name of taxpayer or purchaser of stamps: The Albertson Company, a corporation.

Business address: 5225 Wilshire Blvd., Los Angeles 36, California.

Residence: .....

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: Sixth California.

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from Jan. 1, 1944, to Dec. 31, 1944.

3. Character of assessment or tax: income tax, chapter 1.

4. Amount of assessment, \$304.88; dates of payment: 3/2/45, 142.87; 9/16/47, 162.01.

5. Date stamps were purchased from the Government: .....

6. Amount to be refunded plus interest from March 15, 1945: \$145.63.

7. Amount to be abated (not applicable to income, gift, or estate taxes).....

8. The time within which this claim may be legally filed expires, under section 322(b) of the Internal Revenue Code on September 16, 1949.

The deponent verily believes that this claim should be allowed for the following reasons:

See attached sheet.

Signed:

THE ALBERTSON COMPANY,  
By C. L. AUSTIN,  
Vice President.

Subscribed and sworn to before me this 6 day of September, 1949.

.....  
Deputy Collector.

The taxpayer sold the following real properties during the taxable year:

5001 N. Figueroa St., Los Angeles, California, being the Southwesterly 107 feet of the Northwest-erly 125 feet of the Southeasterly 139 feet of Lot 1 of the Subdivision of Highland Park Tract as per map recorded in Book 5, Page 145, of Miscellaneous Records of Los Angeles County. Purchased March 21, 1924. Sold May 3, 1944.

707 E. Seventh St., Los Angeles, California,



being a tract of land bounded Northerly by Block 22 of the Wolfskill Orchard Tract, Easterly by Towne Ave., Southerly by Seventh St., and West-erly by Crocker St. in the City Lands of Los An-geles as per map recorded in Book 2, Pages 504, 505 of Miscellaneous Records of Los Angeles County. Purchased May 5, 1927. Sold May 31, 1944.

3320 Whittier Blvd., Los Angeles, California, being Lots 4, 5, and 6 of LaRosa Terrace as per map recorded in Book 22, Page 160 of Maps, Records of Los Angeles County. Purchased Sep-tember 29, 1926. Sold April 12, 1944.

The adjusted basis for determining the loss from the sale of those properties should have included as a part of the cost of the properties the taxes which were a lien on the properties at the time they were acquired and which were assumed and paid by the taxpayer. *Magruder v. Supplee*, 316 U.S. 394; *California Sanitary Company, Ltd.* (1935), 32 BTA 122; *Allen Anderson* (1933), 27 BTA 980. The basis of the Seventh Street prop-erty should also have included the buyer's escrow fee, the fee for recording the deed, and the amount paid the seller in reimbursement of the buyer's pro rata share of the 1926 taxes calculated as ap-plicable to the fiscal year July 1, 1926, to June 30, 1927, all of which were paid by the taxpayer through escrow.

These taxes and other costs are shown in detail in the tabulation below:

Property	Date Paid	Character of Payment	Amount
5001 N. Figueroa St.	11/29/24	1924 Taxes—1st inst.	\$ 253.72
5001 N. Figueroa St.	4/24/25	1924 Taxes—2nd inst.	253.71
707 E. 7th St.	5/ 6/27	Buyer's escrow fee..	5.00
707 E. 7th St.	5/ 6/27	Recording deed .....	1.00
707 E. 7th St.	5/ 6/27	Taxes pro rata.....	413.37
707 E. 7th St.	11/30/27	1927 Taxes—1st inst.	1,333.51
707 E. 7th St.	4/26/28	1927 Taxes—2nd inst.	1,333.49
Whittier Blvd., Lot 4	12/ 2/26	1926 Taxes—1st inst.	43.15
Whittier Blvd., Lot 5	12/ 2/26	1926 Taxes—1st inst.	43.93
Whittier Blvd., Lot 6	12/ 2/26	1926 Taxes—1st inst.	58.05
Whittier Blvd., Lot 4	4/20/27	1926 Taxes—2nd inst.	43.13
Whittier Blvd., Lot 5	4/20/27	1926 Taxes—2nd inst.	43.91
Whittier Blvd., Lot 6	4/20/27	1926 Taxes—2nd inst.	58.05
Whittier Blvd.		Recording deed .....	(.60)
Total .....			<u>\$3,883.42</u>

None of the above costs was included in the basis of the properties sold in determining the amount of the assessment shown on line 4 of this claim. Accordingly, taxpayer is entitled to a refund computed as follows:

Net income per Conferee's Revision enclosed in letter of July 17, 1947, from the Internal Revenue Agent in Charge, Los Angeles Division.....	\$14,490.52
Less increase in basis of assets sold.....	3,883.42
Corrected net income.....	<u>\$10,607.10</u>
Less U. S. obligation interest.....	5,792.87
Adjusted net income.....	<u>\$ 4,814.23</u>
Less dividends received credit.....	4,092.10
Normal-tax net income.....	<u>\$ 722.13</u>
Tax: \$722.13 @ 15%.....	<u>\$ 108.32</u>
Corrected net income, per above.....	<u>\$10,607.10</u>
Less dividends received credit.....	9,016.04
Corporation surtax net income.....	<u>\$ 1,591.06</u>
Surtax: \$1,591.06 @ 10%.....	<u>\$ 159.11</u>

Summary of Above Taxes

Normal tax .....	\$ 108.32
Surtax .....	159.11
	<hr/>
Total .....	\$ 267.43
Less foreign income tax credit.....	108.18
	<hr/>
Correct assessment .....	\$ 159.25
Previously assessed and paid.....	304.88
	<hr/>
Amount to be refunded, with interest.....	\$ 145.63
	<hr/> <hr/>

EXHIBIT B

Form 843

Treasury Department

Internal Revenue Service

(Revised July 1947)

Claim

To Be Filed With the Collector Where Assessment  
Was Made or Tax Paid

Collector's Stamp (Date Received) [Blank]

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse.

- Refund of Taxes Illegally, Erroneously, or Excessively Collected.
- Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

State of California,

County of Los Angeles—ss.

Name of taxpayer or purchaser of stamps: The  
Albertson Company, a corporation.

Business address: 5225 Wilshire Blvd., Los An-  
geles 36, California.

Residence: .....

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed:  
Sixth California.

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from Jan. 1, 1944, to Dec. 31, 1944.

3. Character of assessment or tax: personal holding company surtax, chapter 2, subchapter A.

4. Amount of assessment, \$4,490.65; dates of payment: 3/2/45, 10.95; 9/16/47, 4,479.70.

5. Date stamps were purchased from the Government: .....

6. Amount to be refunded plus interest from March 15, 1945: \$3,264.41.

7. Amount to be abated (not applicable to income, gift, or estate taxes).....

8. The time within which this claim may be legally filed expires, under sections 508 and 322(b) of Internal Revenue Code on September 16, 1949.

The deponent verily believes that this claim should be allowed for the following reasons:

See attached sheet.

Signed:

THE ALBERTSON COMPANY,  
By C. L. AUSTIN,  
Vice President.

Subscribed and sworn to before me this 6 day of September, 1949.

.....  
Deputy Collector.

The taxpayer sold the following real properties during the taxable year:

5001 N. Figueroa St., Los Angeles, California, being the Southwesterly 107 feet of the Northwest-erly 125 feet of the Southeasterly 139 feet of Lot 1 of the Subdivision of Highland Park Tract as per map recorded in Book 5, Page 145, of Miscellaneous Records of Los Angeles County. Purchased March 21, 1924. Sold May 3, 1944.

707 E. Seventh St., Los Angeles, California, being a tract of land bounded Northerly by Block 22 of the Wolfskill Orchard Tract, Easterly by Towne Ave., Southerly by Seventh St., and West-erly by Crocker St. in the City Lands of Los An-geles as per map recorded in Book 2, Pages 504, 505 of Miscellaneous Records of Los Angeles County. Purchased May 5, 1927. Sold May 31, 1944.

3320 Whittier Blvd., Los Angeles, California, being Lots 4, 5, and 6 of LaRosa Terrace as per

map recorded in Book 22, Page 160 of Maps, Records of Los Angeles County. Purchased September 29, 1926. Sold April 12, 1944.

The adjusted basis for determining the loss from the sale of those properties should have included as a part of the cost of the properties the taxes which were a lien on the properties at the time they were acquired and which were assumed and paid by the taxpayer. *Magruder v. Supplee*, 316 U.S. 394; *California Sanitary Company, Ltd.* (1935), 32 BTA 122; *Alden Anderson* (1933), 27 BTA 980. The basis of the Seventh Street property should also have included the buyer's escrow fee, the fee for recording the deed, and the amount paid the seller in reimbursement of the buyer's pro rata share of the 1926 taxes calculated as applicable to the fiscal year July 1, 1926, to June 30, 1927, all of which were paid by the taxpayer through escrow.

These taxes and other costs are shown in detail in the tabulation below:

Property	Date Paid	Character of Payment	Amount
5001 N. Figueroa St.	11/29/24	1924 Taxes-1st inst.	\$ 253.72
5001 N. Figueroa St.	4/24/25	1924 Taxes-2nd inst.	253.71
707 E. 7th St.	5/ 6/27	Buyer's escrow fee..	5.00
707 E. 7th St.	5/ 6/27	Recording deed .....	1.00
707 E. 7th St.	5/ 6/27	1926 Taxes pro rata	413.37
707 E. 7th St.	11/30/27	1927 Taxes-1st inst.	1,333.51
707 E. 7th St.	4/26/28	1927 Taxes-2nd inst.	1,333.49
Whittier Blvd., Lot 4	12/ 2/26	1926 Taxes-1st inst.	43.15
Whittier Blvd., Lot 5	12/ 2/26	1926 Taxes-1st inst.	43.93
Whittier Blvd., Lot 6	12/ 2/26	1926 Taxes-1st inst.	58.05
Whittier Blvd., Lot 4	4/20/27	1926 Taxes-2nd inst.	43.13
Whittier Blvd., Lot 5	4/20/27	1926 Taxes-2nd inst.	43.91
Whittier Blvd., Lot 6	4/20/27	1926 Taxes-2nd inst.	58.05
Whittier Blvd.		Recording deed .....	(.60)
Total .....			<u>\$3,883.42</u>

None of the above costs was included in the basis of the properties sold in determining the amount of the assessment shown on line 4 of this claim. Accordingly, taxpayer is entitled to a refund computed as follows:

Revised undistributed subchapter A net income per Conferec's Revision enclosed in letter of July 17, 1947, from the Internal Revenue Agent in Charge, Los Angeles Division.....	\$5,518.41
Less increase in basis of assets sold.....	3,883.42
	<hr/>
Corrected undistributed subchapter A net income..	\$1,634.99
	<hr/>
Surtax: \$1,634.99 @ 75%.....	\$1,226.24
Previously assessed and paid.....	4,490.65
	<hr/>
Amount to be refunded, with interest.....	\$3,264.41
	<hr/> <hr/>

EXHIBIT C

Form 843

Treasury Department

Internal Revenue Service

(Revised July 1947)

Claim

To Be Filed With the Collector Where Assessment Was Made or Tax Paid

Collector's Stamp (Date Received) [Blank]

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse.

- Refund of Taxes Illegally, Erroneously, or Excessively Collected.
- Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

State of California,  
County of Los Angeles—ss.

Name of taxpayer or purchaser of stamps: The  
Albertson Company, a corporation.

Business address: 5225 Wilshire Blvd., Los An-  
geles 36, California.

Residence: .....

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed:  
Sixth California.

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from Jan. 1, 1945, to Dec. 31, 1945.

3. Character of assessment or tax: income tax, chapter 1.

4. Amount of assessment, \$75,330.31; dates of payment: 12/29/45, \$74,309.07; 9/16/47, \$1,021.24.

5. Date stamps were purchased from the Government: .....

6. Amount to be refunded plus interest from March 15, 1946: \$1,021.24.

7. Amount to be abated (not applicable to income, gift, or estate taxes).....

8. The time within which this claim may be legally filed expires, under section 322(b) of the Internal Revenue Code on September 16, 1949.



The deponent verily believes that this claim should be allowed for the following reasons:

See attached sheet.

Signed:

THE ALBERTSON COMPANY,  
By C. L. AUSTIN,  
Vice President.

Subscribed and sworn to before me this 6 day of September, 1949.

.....  
Deputy Collector.

The taxpayer sold the following real properties during the taxable year:

4927 S. Vermont Ave., Los Angeles, California, being Lots 5 and 6, Block 24, Vermont Ave. Square, as per map recorded in Book 11, Page 33 of Maps, Records of Los Angeles County. Purchased September 13, 1923. Sold April 19, 1945.

The Southeast corner of Wilshire Blvd., and McCarty Drive, Beverly Hills, California, being Lots 3, 4, and 5, Tract 6648, as per map recorded in Book 71, Page 48 of Maps, Records of Los Angeles County. Acquired May 3, 1928. Sold April 19, 1945.

The adjusted basis for determining the gain from the sale of those properties should have included as a part of the cost of the properties the taxes which were a lien on the properties at the

time they were acquired and which were assumed and paid by the taxpayer. *Magruder v. Supplee*, 316 U.S. 394; *California Sanitary Company, Ltd.* (1935), 32 BTA 122; *Alden Anderson* (1933), 27 BTA 980. The basis of the Beverly Hills property should also have included street lighting assessments which were a lien when the property was acquired, additional costs of a Highland Park lot exchanged for the Beverly Hills lots representing taxes which were a lien when that lot was purchased, escrow expense and assessment for municipal improvement, commission paid on the exchange, title policy fee, escrow fees on exchange, and cost of drawing and recording deed.

The above costs are shown in detail in the tabulation below:

Property	Date Paid	Character of Payment	Amount
4927 S. Vermont Ave.	11/30/23	1923 Taxes—1st inst.	\$ 149.35
4927 S. Vermont Ave.	4/25/24	1923 Taxes—2nd inst.	149.32
Wilshire & McCarty, B. H.	1/19/24	Escrow fee on Highland Park Lot.....	6.20
Wilshire & McCarty, B. H.	1/19/24	1923 Taxes on Highland Park Lot.....	63.00
Wilshire & McCarty, B. H.	2/14/27	Assessment, Arroyo #1 Improvement District, on Highland Park Lot.....	40.30
Wilshire & McCarty, B. H.	5/11/28	Commission to Beverly Hills Realty Co. ....	2,000.00
Wilshire & McCarty, B. H.	5/11/28	Pro rata 1927 taxes paid to vendor.....	183.37
Wilshire & McCarty, B. H.	5/11/28	Pro rata 1928 lighting assessments paid to vendor.....	82.08
Wilshire & McCarty, B. H.	5/11/28	Title Policy fee.....	80.50

Property	Date Paid	Character of Payment	Amount
Wilshire & McCarty, B. H.	5/11/28	Escrow fees .....	30.00
Wilshire & McCarty, B. H.	5/11/28	Drawing & recording deed .....	3.20
Wilshire & McCarty, B. H.	11/28/28	1928 Taxes—1st inst.	1,013.68
Wilshire & McCarty, B. H.	4/24/29	1928 Taxes—2nd inst.	1,013.68
Total .....			<u>\$4,814.68</u>

None of the above costs was included in the basis of the properties sold in determining the amount of the assessment shown on line 4 of this claim. Accordingly, taxpayer is entitled to a refund computed as follows:

Tax Imposed by Section 13, I.R.C.

Revised Net Income per Conferee's Revision enclosed in letter of July 17, 1947, from the Internal Revenue Agent in Charge, Los Angeles Division		\$ 51,567.48
Plus revised net capital gain per above Conferee's Revision .....		273,702.77
Net Income .....		<u>\$325,270.25</u>
Less reduction in gain on sale of assets by reason of including above costs in basis.....		4,814.68
Corrected Net Income.....		<u>\$320,455.57</u>
Less: U. S. obligations interest.....	\$ 308.63	
Dividends received credit.....	26,877.96	27,186.59
Normal-tax net income.....		<u>\$293,268.98</u>
Tax @ 24%.....		<u>\$ 70,384.56</u>

Tax Imposed by Section 15, I.R.C.

Corrected Net Income, per above.....		\$320,455.57
Less: Dividends received credit.....		24,837.96
Corporation surtax net income.....		<u>\$295,617.61</u>
Tax @ 16%.....		<u>\$ 47,298.82</u>

## Tax Imposed by Section 500, I.R.C.

Revised Subchapter A net income per above-mentioned Conferee's Revision.....	\$252,142.64
Less Reduction in gain on sale of assets by reason of including above costs in basis.....	4,814.68
Corrected Subchapter A Net Income.....	<u>\$247,327.96</u>
Undistributed Subchapter A Net Income.....	<u><u>\$247,327.96</u></u>
Surtax:	
\$ 2,000.00 @ 75%.....	\$ 1,500.00
245,327.96 @ 85%.....	208,528.77
Total Surtax .....	<u><u>\$210,028.77</u></u>

## Summary of Above Taxes

Sec. 13 .....	\$ 70,384.56
Sec. 15 .....	47,298.82
Sec. 500 .....	210,028.77
Total .....	<u><u>\$327,712.15</u></u>

## Tax Imposed by Section 117(c) (1), I.R.C.

Normal-tax net income .....	\$293,268.98
Less: Excess of net long-term capital gain over net short-term capital loss per Conferee's Revision .....	\$273,702.77
Less reduction in gain by reason of including above costs in basis .....	4,814.68
Balance subject to normal tax.....	<u>24,380.89</u>
Corporation surtax net income.....	\$295,617.61
Less: Excess of net long-term capital gain over net short-term capital loss, as corrected.....	268,888.09
Adjusted surtax net income.....	<u>\$ 26,729.52</u>
Undistributed Subchapter A net income.....	\$247,327.96
Less: Excess of net long-term capital gain over net short-term capital loss, as corrected.....	268,888.09
Remainder .....	<u><u>\$ None</u></u>

Partial Tax:	
Sec. 14 .....	\$ 4,132.37
Sec. 15 .....	2,880.49
Sec. 500 .....	None
<hr/>	
Total partial tax.....	\$ 7,012.86
25% of Excess of net long-term capital gain over net short-term capital loss, as corrected—\$268,888.09	67,222.02
<hr/>	
Total Alternative Tax.....	\$ 74,234.88
Less: Foreign income tax credit.....	108.24
<hr/>	
Correct Assessment .....	\$ 74,126.64
Previously assessed and paid.....	75,330.31
<hr/>	
Overpayment .....	\$ 1,203.67
<hr/> <hr/>	
Amount to be refunded, with interest (limited to amount paid Sept. 16, 1947).....	\$ 1,021.24
<hr/> <hr/>	

[Endorsed]: Filed July 26, 1950.

[Title of District Court and Cause.]

SUMMONS

To the above-named Defendant:

You are hereby summoned and required to serve upon Latham & Watkins, plaintiff's attorney, whose address is 411 W. Fifth St., Los Angeles 13, Calif., an answer to the complaint which is herewith served upon you, within Sixty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: 7/26/50.

[Seal]                   EDMUND L. SMITH,  
Clerk of Court.

By /s/ EDW. F. DREW,  
Deputy Clerk. [19]

## Return on Service of Writ

I hereby certify and return, that on the 10th day of August, 19... , I received this summons and served it together with the complaint herein as follows:

Service on the United States Attorney by leaving a true and correct copy with Gertrude M. Johnson, authorized to accept service; and service on the Attorney General of the United States by registered mail to the Department of Justice, Washington, D. C.; and service on the Collector of Internal Revenue by leaving a true and correct copy with C. M. Commins, authorized to accept service for same.

JAMES J. BOYLE,  
United States Marshal.

By /s/ TOSHIE SHIMIZU,  
Deputy U. S. Marshal.

[Endorsed]: Filed August 11, 1950.

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[Title of District Court and Cause.]

STIPULATION AND ORDER  
EXTENDING TIME TO APPEAR

It Is Hereby Stipulated, by and between the parties hereto, that the defendant may have to and including December 8, 1950, within which to appear, answer or otherwise plead for the reason that defendant's counsel have not yet received the infor-

mation necessary to enable them to plead to the plaintiff's complaint.

Dated: At Los Angeles, California, this 4th day of October, 1950.

LATHAM & WATKINS

By /s/ AUSTIN H. PECK, JR.,  
Attorneys for Plaintiff.

ERNEST A. TOLIN,  
United States Attorney;

E. H. MITCHELL and  
EDWARD R. McHALE,  
Assistants U. S. Attorney.

EUGENE HARPOLE and  
FRANK W. MAHONEY,  
Special Attorneys, Bureau of  
Internal Revenue.

/s/ E. H. MITCHELL,  
Attorneys for Defendant.

It Is So Ordered this 12th day of October, 1950.

/s/ PEIRSON M. HALL,  
Judge.

[Endorsed]: Filed Oct. 12, 1950. [21]

[Title of District Court and Cause.]

STIPULATION AND ORDER  
EXTENDING TIME TO APPEAR

It Is Hereby Stipulated, by and between the parties hereto, that the defendant may have to and including January 15, 1951, within which to appear, answer or otherwise plead for the reason that defendant's counsel have not yet received the information necessary to enable them to plead to the plaintiff's complaint.

Dated: At Los Angeles, California, this 5th day of December, 1950.

LATHAM & WATKINS,

By /s/ RICHARD F. ALDEN,  
Attorneys for Plaintiff.

ERNEST A. TOLIN,  
United States Attorney;

E. H. MITCHELL and  
EDWARD R. McHALE,  
Assistants U. S. Attorney.

EUGENE HARPOLE and  
FRANK W. MAHONEY,  
Special Attorneys, Bureau of  
Internal Revenue.

/s/ E. H. MITCHELL,  
Attorneys for Defendant.

It Is So Ordered this 8th day of December, 1950.

/s/ PEIRSON M. HALL,  
Judge.

[Endorsed]: Filed Dec. 8, 1950. [22]



[Title of District Court and Cause.]

STIPULATION AND ORDER  
EXTENDING TIME TO APPEAR

It Is Hereby Stipulated, by and between the parties hereto, that the defendant may have to and including February 14, 1951, within which to appear, answer or otherwise plead for the reason that defendant's counsel have not yet received the information necessary to enable them to plead to the plaintiff's complaint.

Dated: At Los Angeles, California, this 15th day of January, 1951.

LATHAM & WATKINS,

By /s/ AUSTIN H. PECK, JR.,  
Attorneys for Plaintiff.

ERNEST A. TOLIN,  
United States Attorney;

E. H. MITCHELL and  
EDWARD R. McHALE,  
Assistants U. S. Attorney.

EUGENE HARPOLE and  
FRANK W. MAHONEY,  
Special Attorneys, Bureau of  
Internal Revenue.

By /s/ E. H. MITCHELL,  
Attorneys for Defendant.

It Is So Ordered this 22nd day of January, 1951.

/s/ PEIRSON M. HALL,  
Judge.

[Endorsed]: Filed Jan. 22, 1951. [23]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT  
UNITED STATES OF AMERICA

Comes now the defendant in the above-entitled action and in answer to plaintiff's complaint, admits, denies and alleges:

I.

Admits the allegations contained in paragraph I thereof.

II.

Admits the allegations contained in paragraph II thereof, except that it is denied that either the income taxes or the personal holding company surtax and interest thereon was or were erroneously and/or illegally collected from the plaintiff for the calendar years 1944 and 1945.

III.

Admits the allegations contained in paragraph III thereof, except that each and every allegation contained in the plaintiff's claims for refund attached to the complaint of the plaintiff, as Exhibits "A," "B," and "C," is specifically denied except those that are admitted in this answer.

IV.

Admits the allegations contained in paragraph IV thereof. [24]

V.

Admits the allegations contained in paragraph V thereof.

VI.

Admits the allegations contained in paragraph VI thereof.

VII.

Admits the allegations contained in paragraph VII thereof.

VIII.

Admits the allegations contained in paragraph VIII thereof.

IX.

Admits the allegations contained in paragraph IX thereof.

X.

Denies the allegations contained in paragraph X thereof.

XI.

Admits the allegations contained in paragraph XI thereof, except that each and every allegation contained in the claims for refund filed by the plaintiff on September 6, 1949, and attached to the complaint as Exhibits "A," "B," and "C," is specifically denied, except those that are admitted in this answer.

XII.

Admits the allegations contained in paragraph XII thereof.

XIII.

Denies the allegations contained in paragraph XIII thereof.

## XIV.

The defendant alleges that the taxes, escrow fees, recording costs, and other related expenses referred to in paragraphs III and VII of the complaint were not capitalized but instead were deducted by the plaintiff, and tax benefits were received therefor, on the income tax returns of the plaintiff for the years 1923 through 1929, respectively, as the expenses were paid, in determining the plaintiff's net income subject to tax in each of such years.

## XV.

The defendant alleges that the deductions so taken by plaintiff [25] as to the taxes, escrow fees, recording costs and other related expenses referred to in paragraph XIV of this answer, in equity and good conscience cannot be included as a part of the cost of the properties referred to in paragraph III of the complaint, and cannot be so included under Section 113(b)(1)(A) of the Internal Revenue Code.

Wherefore, having fully answered, defendant prays that it be hence dismissed with its costs in this behalf expended.

ERNEST A. TOLIN,

United States Attorney;

E. H. MITCHELL and

EDWARD R. McHALE,

Assistants U. S. Attorney.

EUGENE HARPOLE and  
FRANK W. MAHONEY,  
Special Attorneys, Bureau of  
Internal Revenue.

/s/ E. H. MITCHELL,  
Attorneys for Defendant,  
United States of America.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Feb. 14, 1951. [26]

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[Title of District Court and Cause.]

### STIPULATION OF FACTS

Plaintiff and Defendant in the above-entitled cause, through their respective counsel, hereby stipulate that the following facts are true, without prejudice to the right of either party to adduce additional evidence not inconsistent herewith, and reserving to each party the right to object to any facts herein stated upon the grounds of irrelevancy and immateriality:

#### I.

Plaintiff is a corporation duly organized and operating under the laws of the State of California. It maintains its principal place of business in Los Angeles, California. [28]

#### II.

Plaintiff filed its federal income tax return, Treasury Department form 1120, and its federal

personal holding company return, Treasury Department form 1120H, for the calendar year 1944 in the office of the Collector of Internal Revenue for the Sixth District of California at Los Angeles, California. Plaintiff filed its federal income tax return, Treasury Department form 1120, for the calendar year 1945 in the office of said Collector. Each of said returns was filed within the time prescribed therefor by the applicable provisions of the Internal Revenue Code.

### III.

On March 21, 1924, plaintiff purchased the real property at 5001 North Figueroa Street, Los Angeles, California, being the Southwesterly 107 feet of the Northwesterly 125 feet of the Southeasterly 139 feet of Lot 1 of the Subdivision of Highland Park Tract as per map recorded in Book 5, Page 145, of Miscellaneous Records of Los Angeles County. At the time of said purchase, said real property was subject to the lien for real property taxes for the fiscal year July 1, 1924, to June 30, 1925. Said taxes were paid by plaintiff as follows:

Date Paid	Character of Payment	Amount
11/29/24—1924	Taxes—1st inst.....	\$253.72
4/24/35—1924	Taxes—2nd inst.....	\$253.71
Total.....		\$507.43

### IV.

Plaintiff sold the real property described in paragraph III hereof on or about May 3, 1944. In com-

puting its loss resulting from said sale, plaintiff included in the basis (unadjusted) of said property said sum of \$507.43.

V.

On May 5, 1927, plaintiff purchased the real property at 707 East Seventh Street, Los Angeles, California, being a tract of [29] land bounded Northerly by Block 22 of Wolfskill Orchard Tract, Easterly by Towne Avenue, Southerly by Seventh Street, and Westerly by Crocker Street in the City Lands of Los Angeles as per map recorded in Book 2, pages 504, 505 of Miscellaneous Records of Los Angeles County. At the time of said purchase, said real property was subject to the lien for real property taxes for the fiscal year July 1, 1927, to June 30, 1928; and in addition, plaintiff paid the seller a pro rata share of the taxes on said property applicable to the fiscal year July 1, 1926, to June 30, 1927. Other costs of said purchase were the buyer's escrow fee and the fee for recording the deed. Said taxes and other costs were paid by plaintiff as follows:

Date Paid	Character of Payment	Amount
5/ 6/27—	Buyer's escrow fee.....	\$ 5.00
5/ 6/27—	Recording deed.....	1.00
5/ 6/27—	1926 pro rata taxes.....	413.37
11/30/27—	1927 Taxes—1st inst.....	1,333.51
4/26/28—	1927 Taxes—2nd inst.....	1,333.49
	Total.....	<hr/> \$3,086.37

## VI.

Plaintiff sold the real property described in paragraph V hereof on or about May 31, 1944. In computing its loss resulting from said sale, plaintiff included in the basis (unadjusted) of said property said sum of \$3,086.37.

## VII.

On September 29, 1926, plaintiff purchased the real property at 3320 Whittier Boulevard, Los Angeles, California, being Lots 4, 5, and 6 of La Rosa Terrace as per map recorded in Book 22, Page 160 of Maps, Records of Los Angeles County. At the time of said purchase, said real property was subject to the lien for real property taxes for the fiscal year July 1, 1926, to June 30, 1927. Other costs of said purchase were the buyer's fee for recording the deed. [30] Said taxes and other costs were paid by plaintiff as follows:

Lot	Date Paid	Character of Payment	Amount
4	12/2/26—1926	Taxes—1st inst.....	\$ 43.15
5	12/2/26—1926	Taxes—1st inst.....	43.93
6	12/2/26—1926	Taxes—1st inst.....	58.05
4	4/20/27—1926	Taxes—2nd inst.....	43.13
5	4/20/27—1926	Taxes—2nd inst.....	43.91
6	4/20/27—1926	Taxes—2nd inst.....	58.05
		Recording deed.....	(.60)
Total.....			<u>\$289.62</u>

## VIII.

Plaintiff sold the real property described in paragraph VII hereof on or about April 12, 1944. In



computing its loss resulting from said sale, plaintiff included in the basis (unadjusted) of said property said sum of \$289.62.

IX.

On September 13, 1923, plaintiff purchased the real property at 4927 South Vermont Avenue, Los Angeles, California, being Lots 5 and 6, Block 24, Vermont Avenue Square, as per map recorded in Book 11, Page 33 of Maps, Records of Los Angeles County. At the time of said purchase, said real property was subject to the lien for real property taxes for the fiscal year July 1, 1923, to June 30, 1924. Said taxes were paid by plaintiff as follows:

Date Paid	Character of Payment	Amount
11/30/23—1923	Taxes—1st inst.....	\$149.35
4/25/24—1923	Taxes—2nd inst.....	149.32
Total.....		<hr/> \$298.67

X.

Plaintiff sold the real property described in paragraph IX hereof on or about April 19, 1945. In computing its gain resulting from said sale, plaintiff included in the basis (unadjusted) of said property said sum of \$298.67. [31]

XI.

On May 3, 1928, plaintiff acquired the real property at the Southeast Corner of Wilshire Boulevard and McCarty Drive, Beverly Hills, California, being

Lots 3, 4, and 5, Tract 6648, as per map recorded in Book 71, Page 48 of Maps, Records of Los Angeles County. At the time of said purchase, said real property was subject to the lien for real property taxes for the fiscal year July 1, 1928, to June 30, 1929. In addition plaintiff paid the seller a pro rata share of the taxes and lighting assessments on said property applicable to the fiscal year July 1, 1927, to June 30, 1928. Other costs were escrow fees, commission paid, title policy fee, and cost of drawing and recording deed. As a part of said acquisition plaintiff exchanged a lot in Highland Park, California; said lot, when purchased by plaintiff, was subject to the lien for real property taxes for the fiscal year July 1, 1923, to June 30, 1924. In addition, an escrow fee was incurred in connection with such purchase; and an improvement assessment was later paid. All of the taxes and other costs above described were paid by the plaintiff as follows:

Date Paid	Character of Payment	Amount
1/19/24—	Escrow fee on Highland Park Lot .....	\$ 6.20
1/19/24—	1923 Taxes on Highland Park Lot .....	63.00
2/14/27—	Assessment, Arroyo #1, Im- provement District, on Highland Park Lot .....	40.30
5/11/28—	Commission to Beverly Hills Realty Co. ....	2,000.00

Date Paid	Character of Payment	Amount
5/11/28—	Pro rata 1927 taxes paid to vendor . . . . .	183.37
5/11/28—	Pro rata 1928 lighting assessment paid to vendor . . . . .	82.08
5/11/28—	Title Policy fee . . . . .	80.50
5/11/28—	Escrow fee . . . . .	30.00
5/11/28—	Drawing & recording deed . . . . .	3.20
11/28/28—	1928 Taxes—1st inst. . . . .	1,013.68
4/24/29—	1928 Taxes—2nd inst. . . . .	1,013.68
Total . . . . .		\$4,516.01

## XII.

Plaintiff sold the real property described above in paragraph XI on or about April 19, 1945. In computing its gain resulting from said sale, plaintiff included in the basis (unadjusted) of said property said sum of \$4,516.01.

## XIII.

The amounts so included in basis (unadjusted) of the several properties sold as above described had been deducted by plaintiff from gross income in the years in which paid in determining plaintiff's net income subject to tax for said years. Said deductions resulted in tax benefits to plaintiff in said years of payment in the total amount of \$1,070.52. Of said total benefit, \$500.45 was realized by plaintiff by reason of deduction of the items hereinabove described applicable to the parcels sold in 1944; and the balance of \$570.07 was the result of the deduction of the items hereinabove described attributable to the parcels sold in 1945.

## XIV

Field and/or office audits of plaintiff's federal income tax returns for the calendar years 1923, 1924, 1925, 1926, 1927, 1928, and 1929 were made by the Office of the Internal Revenue Agent in Charge at Los Angeles, California, and written reports of the audits covering the years 1923, 1926, 1927 and 1929 and the period January 1 to June 30, 1928, were submitted to plaintiff. None of said reports disallowed or otherwise adjusted any of the deductions, or any portion thereof, taken by plaintiff as hereinabove described. The following statements are quoted from said reports:

(a) Report of Revenue Agent Carl E. Siegmund, dated January 6, 1927, covering plaintiff's return for the calendar year 1923: [33]

“Compensation of officers, interest, taxes and general expenses for 1923 were verified with the records available, and outside of some corrections as to general expenses, were found correct as reported.”

(b) Report of Revenue Agent Claude A. Dewey, dated December 13, 1929, covering plaintiff's return for the calendar year 1927:

“The examining officer has accepted the depreciation rates and amounts claimed per the returns filed. Haskins & Sells audit for 1927 disclosed retirements based on assets exhausted and the net assets after these adjustments appear substantially correct.

“Complete cooperation was given the exam-

iner by this taxpayer and his (sic) accountants.”

(c) Report of Revenue Agent R. M. Allan, dated February 20, 1930, covering plaintiff's return for the six months period ended June 30, 1928:

“The additions to the land account during the year amounted to \$120,000 representing the cash payment in connection with the exchange of vacant property in Highland Park for three lots in Beverly Hills.”

(d) Report of Revenue Agent George W. Givan, dated December 16, 1931, covering the calendar year 1929:

“On February 24, 1930, the Franchise Tax Commissioner of the State of California proposed a deficiency in tax of \$2,871.07 due and payable as of May 15, 1929, and September 15, 1929. The taxpayer protested this amount on May 14, 1930, and agreed to the payment of an additional amount of \$400.22 on June 10, 1930. The difference of \$2,470.85 was credited to surplus in 1930.

“The taxpayer adjusted its books in 1929 by debiting State franchise taxes paid and crediting accounts payable [34] in the amount of \$2,871.07. Since this amount was only a contingent liability on December 31, 1929, the taxpayer may only deduct in 1929 the amount of the actual liability in 1929 which was determined to be \$400.22. The difference of \$2,470.85 is to be restored to income for the year 1929.”

(e) On September 15, 1927, plaintiff received a letter from the Internal Revenue Agent in Charge in Los Angeles, California, covering the years 1924 and 1925, which letter stated as follows:

“Upon the basis of information received, recommendation is being made to the Commissioner of Internal Revenue that your income tax returns for these years be accepted as filed.”

Taxpayer's return for the calendar year 1924 claimed as a deduction on account of taxes, at line 16 of page 1 of the return, the sum of \$16,054.01. In schedule (e), page 2 of said return, said taxes were itemized. They included the following entry:

“City, state and county taxes on real estate and personal property \$11,343.51.”

#### XV.

Balance sheets attached to or included in plaintiff's federal income tax returns for the calendar years 1923 through 1928 disclose that the land and buildings accounts increased as follows:

Date	Land	Buildings (Before Depreciation)
1/1/23	\$203,614.27*	
1/1/24	286,999.65*	
1/1/25	224,317.50	\$176,786.18
1/1/26	314,247.50	266,053.71
1/1/27	338,073.54	337,778.03
1/1/28	488,073.54	417,949.50
1/1/29	608,073.54	417,287.29

\*Includes buildings.

XVI.

Plaintiff's federal income and personal holding company returns for the calendar years 1944 and 1945 were examined by the Commissioner of Internal Revenue acting through the Internal Revenue Agent in Charge, Los Angeles, California. Upon said examination it was determined by said Commissioner of Internal Revenue that plaintiff could not include the taxes, escrow fees, recording costs, and other related expenses hereinabove specified in the basis (unadjusted) of properties sold in 1944 and 1945. Said amounts were excluded from the basis (unadjusted) of said properties by said Commissioner.

XVII.

As a result of the determinations described in the immediately preceding paragraph XVI, said Commissioner of Internal Revenue assessed additional income taxes against plaintiff in the amounts of \$162.01 for the calendar year 1944 and \$1,021.24 for the calendar year 1945. In addition, said Commissioner assessed additional personal holding company surtax against plaintiff in the amount of \$4,479.70 for the calendar year 1944.

XVIII.

On or about September 16, 1947, plaintiff paid to the Collector of Internal Revenue for the Sixth District of California at Los Angeles, California, all of said amounts assessed as described in the immediately preceding paragraph XVII, the total of

said assessments paid being \$5,662.95, together with interest thereon.

### XIX.

On or about September 6, 1949, plaintiff filed with the Collector of Internal Revenue for the Sixth District of California, at Los Angeles, California, claims for refund of taxes for the [36] calendar years 1944 and 1945 in the following amounts:

Year	Type of Tax	Amount
1944—	Income tax .....	\$ 145.63
	(plus interest from March 15, 1945)	
1944—	Personal Holding	
	Company Surtax .....	\$3,264.41
	(plus interest from March 15, 1945)	
1945—	Income tax .....	\$1,021.24
	(plus interest from March 15, 1946)	

### XX.

On or about July 10, 1950, the Commissioner of Internal Revenue mailed to plaintiff by registered mail a notice of disallowance of said claims for refund and each of them.

### XXI.

Plaintiff's complaint herein for recovery of said taxes was filed on July 25, 1950.

Dated: March 18, 1952.

Respectfully submitted,

LATHAM & WATKINS,

By /s/ AUSTIN H. PECK, JR.,

Attorneys for Plaintiff.



WALTER S. BINNS,  
United States Attorney.

E. H. MITCHELL, and  
EDWARD R. McHALE,  
Ass't U. S. Attorneys.

EUGENE HARPOLE,  
FRANK W. MAHONEY,  
Special Attorneys, Bureau of  
Internal Revenue;

By /s/ EDWARD R. McHALE,  
Attorneys for Defendant.

[Endorsed]: Filed April 7, 1952. [37]

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[Title of District Court and Cause.]

MINUTES OF THE COURT—AUGUST 15, 1952

Present: The Honorable Peirson M. Hall,  
District Judge.

Proceedings: The court having heretofore taken  
this case under submission;

It Is Ordered That judgment be entered for the  
plaintiff and counsel for the plaintiff is ordered to  
prepare findings, etc., and judgment for the signa-  
ture of the court.

EDMUND L. SMITH,  
Clerk,

By FRANCIS E. CROSS,  
Deputy Clerk. [38]

[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The parties in the above-entitled cause, having submitted this matter upon a written Stipulation of Facts and written briefs, and said facts and briefs having been carefully considered by the Court, the Court makes the following Findings of Fact and Conclusions of Law.

### Findings of Fact

#### I.

Plaintiff is a corporation duly organized and operating under the laws of the State of California. It maintains its principal place of business in Los Angeles, California.

#### II.

Plaintiff filed its federal income tax return, Treasury Department form 1120, and its federal personal holding company return, Treasury Department form 1120H, for the calendar year 1944 in the office of the Collector of Internal Revenue for the Sixth District of California at Los Angeles, California. Plaintiff filed [39] its federal income tax return, Treasury Department form 1120, for the calendar year 1945 in the office of said Collector. Each of said returns was filed within the time prescribed therefor by the applicable provisions of the Internal Revenue Code.

III.

On March 21, 1924, plaintiff purchased the real property at 5001 North Figueroa Street, Los Angeles, California, being the Southwesterly 107 feet of the Northwesterly 125 feet of the Southeasterly 139 feet of Lot 1 of the Subdivision of Highland Park Tract as per map recorded in Book 5, Page 145, of Miscellaneous Records of Los Angeles County. At the time of said purchase, said real property was subject to the lien for real property taxes for the fiscal year July 1, 1924, to June 30, 1925. Said taxes were paid by plaintiff as follows:

Date Paid	Character of Payment	Amount
11/29/24—1924	Taxes—1st inst.....	\$253.72
4/24/25—1924	Taxes—2nd inst.....	\$253.71
Total.....		\$507.43

IV.

Plaintiff sold the real property described in paragraph III hereof on or about May 3, 1944. In computing its loss resulting from said sale, plaintiff included in the basis (unadjusted) of said property said sum of \$507.43.

V.

On May 5, 1927, plaintiff purchased the real property at 707 East Seventh Street, Los Angeles, California, being a tract of land bounded Northerly by Block 22 of Wolfskill Orchard Tract, Easterly by Towne Avenue, Southerly by Seventh Street, and Westerly by Crocker Street in the City Lands

of Los Angeles as per map recorded in Book 2, pages 504, 505 of Miscellaneous Records of Los Angeles County. At the time of said purchase, said real property was subject to the lien for real property taxes for the fiscal [40] year July 1, 1927, to June 30, 1928; and in addition, plaintiff paid the seller a pro rata share of the taxes on said property applicable to the fiscal year July 1, 1926, to June 30, 1927. Other costs of said purchase were the buyer's escrow fee and the fee for recording the deed. Said taxes and other costs were paid by plaintiff as follows:

Date Paid	Character of Payment	Amount
5/ 6/27—	Buyer's escrow fee.....	\$ 5.00
5/ 6/27—	Recording deed.....	1.00
5/ 6/27—	1926 pro rata taxes.....	413.37
11/30/27—	1927 Taxes—1st inst.....	1,333.51
4/26/28—	1927 Taxes—2nd inst.....	1,333.49
	Total.....	<u>\$3,086.37</u>

## VI.

Plaintiff sold the real property described in paragraph V hereof on or about May 31, 1944. In computing its loss resulting from said sale, plaintiff included in the basis (unadjusted) of said property said sum of \$3,086.37.

## VII.

On September 29, 1926, plaintiff purchased the real property at 3320 Whittier Boulevard, Los Angeles, California, being Lots 4, 5, and 6 of La

Rosa Terrace as per map recorded in Book 22, Page 160 of Maps, Records of Los Angeles County. At the time of said purchase, said real property was subject to the lien for real property taxes for the fiscal year July 1, 1926, to June 30, 1927. Other costs of said purchase were the buyer's fee for recording the deed. Said taxes and other costs were paid by plaintiff as follows:

Lot	Date Paid	Character of Payment	Amount
4	12/ 2/26—1926	Taxes—1st inst.....	\$ 43.15
5	12/ 2/26—1926	Taxes—1st inst.....	43.93
6	12/ 2/26—1926	Taxes—1st inst.....	58.05
4	4/20/27—1926	Taxes—2nd inst.....	43.13
5	4/20/27—1926	Taxes—2nd inst.....	43.91
6	4/20/27—1926	Taxes—2nd inst.....	58.05
		Recording deed.....	(.60)
Total.....			\$289.62

VIII.

Plaintiff sold the real property described in paragraph VII hereof on or about April 12, 1944. In computing its loss resulting from said sale, plaintiff included in the basis (unadjusted) of said property said sum of \$289.62.

IX.

On September 13, 1923, plaintiff purchased the real property at 4927 South Vermont Avenue, Los Angeles, California, being Lots 5 and 6, Block 24, Vermont Avenue Square, as per map recorded in Book 11, Page 33 of Maps, Records of Los Angeles

County. At the time of said purchase, said real property was subject to the lien for real property taxes for the fiscal year July 1, 1923, to June 30, 1924. Said taxes were paid by plaintiff as follows:

Date Paid	Character of Payment	Amount
11/30/23—1923 Taxes—1st inst.....		\$149.35
4/25/24—1923 Taxes—2nd inst.....		149.32
Total.....		\$298.67

### X.

Plaintiff sold the real property described in paragraph IX hereof on or about April 19, 1945. In computing its gain resulting from said sale, plaintiff included in the basis (unadjusted) of said property said sum of \$298.67.

### XI.

On May 3, 1928, plaintiff acquired the real property at the Southeast Corner of Wilshire Boulevard and McCarty Drive, Beverly Hills, California, being Lots 3, 4 and 5, Tract 6648, as [42] per map recorded in Book 71, Page 48 of Maps, Records of Los Angeles County. At the time of said purchase, said real property was subject to the lien for real property taxes for the fiscal year July 1, 1928, to June 30, 1929. In addition, plaintiff paid the seller a pro rata share of the taxes and lighting assessments on said property applicable to the fiscal year July 1, 1927, to June 30, 1928. Other costs were escrow fees, commission paid, title policy fee, and cost of drawing and recording deed. As a part

of said acquisition plaintiff exchanged a lot in Highland Park, California; said lot, when purchased by plaintiff, was subject to the lien for real property taxes for the fiscal year July 1, 1923, to June 30, 1924. In addition, an escrow fee was incurred in connection with such purchase; and an improvement assessment was later paid. All of the taxes and other costs above described were paid by the plaintiff as follows:

Date Paid	Character of Payment	Amount
1/19/24—	Escrow fee on Highland Park Lot .....	\$ 6.20
1/19/24—	1923 Taxes on Highland Park Lot .....	63.00
2/14/27—	Assessment, Arroyo #1, Im- provement District, on Highland Park Lot .....	40.30
5/11/28—	Commission to Beverly Hills Realty Co. ....	2,000.00
5/11/28—	Pro rata 1927 taxes paid to vendor .....	183.37
5/11/28—	Pro rata 1928 lighting assess- ment paid to vendor .....	82.08
5/11/28—	Title Policy fee.....	80.50
5/11/28—	Escrow fee .....	30.00
5/11/28—	Drawing & recording deed ....	3.20
11/28/28—	1928 Taxes—1st inst. ....	1,013.68
4/24/29—	1928 Taxes—2nd inst. ....	1,013.68
	Total .....	<hr/> \$4,516.01

## XII.

Plaintiff sold the real property described above in paragraph [43] XI on or about April 19, 1945. In computing its gain resulting from said sale, plaintiff included in the basis (unadjusted) of said property said sum of \$4,516.01.

## XIII.

The amounts so included in basis (unadjusted) of the several properties sold as above described had been deducted by plaintiff from gross income in the years in which paid in determining plaintiff's net income subject to tax for said years. Said deductions resulted in tax benefits to plaintiff in said years of payment in the total amount of \$1,070.52. Of said total benefit, \$500.45 was realized by plaintiff by reason of deduction of the items hereinabove described applicable to the parcels sold in 1944; and the balance of \$570.07 was the result of the deductions of the items hereinabove described attributable to the parcels sold in 1945.

## XIV.

Field and/or office audits of plaintiff's federal income tax returns for the calendar years 1923, 1924, 1925, 1926, 1927, 1928 and 1929 were made by the Office of the Internal Revenue Agent in Charge at Los Angeles, California, and written reports of the audits covering the years 1923, 1926, 1927 and 1929 and the period January 1 to June 30, 1928, were submitted to plaintiff. None of said reports disallowed or otherwise adjusted any of the deduc-



tions, or any portion thereof, taken by plaintiff as hereinabove described. The following statements are quoted from said reports:

(a) Report of Revenue Agent Carl E. Siegmund, dated January 6, 1927, covering plaintiff's return for the calendar year 1923:

"Compensation of officers, interest, taxes and general expenses for 1923 were verified with the records available, and outside of some corrections as to general expenses, were found correct as reported." [44]

(b) Report of Revenue Agent Claude A. Dewey, dated December 13, 1929, covering plaintiff's return for the calendar year 1927:

"The examining officer has accepted the depreciation rates and amounts claimed per the returns filed. Haskins & Sells audit for 1927 disclosed retirements based on assets exhausted and the net assets after these adjustments appear substantially correct.

"Complete co-operation was given the examiner by this taxpayer and his (sic) accountants."

(c) Report of Revenue Agent R. M. Allan, dated February 20, 1930, covering plaintiff's return for the six months period ended June 30, 1928:

"The additions to the land account during the year amounted to \$120,000 representing the cash payment in connection with the exchange of vacant property in Highland Park for three lots in Beverly Hills."

(d) Report of Revenue Agent George W. Givan, dated December 16, 1931, covering the calendar year 1929:

“On February 24, 1930, the Franchise Tax Commissioner of the State of California proposed a deficiency in tax of \$2,871.07 due and payable as of May 15, 1929, and September 15, 1929. The taxpayer protested this amount on May 14, 1930, and agreed to the payment of an additional amount of \$400.22 on June 10, 1930. The difference of \$2,470.85 was credited to surplus in 1930.

“The taxpayer adjusted its books in 1929 by debiting State franchise taxes paid and crediting accounts payable in the amount of \$2,871.07. Since this amount was only a contingent liability on December 31, 1929, the taxpayer may only deduct in 1929 the amount of the actual liability in 1929 which was determined to be \$400.22. The difference [45] of \$2,470.85 is to be restored to income for the year 1929.”

(e) On September 15, 1927, plaintiff received a letter from the Internal Revenue Agent in Charge in Los Angeles, California, covering the years 1924 and 1925, which letter stated as follows:

“Upon the basis of information received, recommendation is being made to the Commissioner of Internal Revenue that your income tax returns for these years be accepted as filed.”

Taxpayer's return for the calendar year 1924 claimed as a deduction on account of taxes, at line 16 of page 1 of the return, the sum of \$16,054.01. In schedule (e), page 2 of said return, said taxes were itemized. They included the following entry:

“City, state and county taxes on real estate and personal property \$11,343.51.”

## XV.

Balance sheets attached to or included in plaintiff's federal income tax returns for the calendar years 1923 through 1928 disclose that the land and buildings accounts increased as follows:

Date	Land	Buildings (Before Depreciation)
1/1/23	\$203,614.27*	
1/1/24	286,999.65*	
1/1/25	224,317.50	\$176,786.18
1/1/26	314,247.50	266,053.71
1/1/27	338,073.54	337,778.03
1/1/28	488,073.54	417,949.50
1/1/29	608,073.54	417,287.29

\*Includes buildings. [46]

## XVI.

Plaintiff's federal income and personal holding company returns for the calendar years 1944 and 1945 were examined by the Commissioner of Internal Revenue, acting through the Internal Revenue Agent in Charge, Los Angeles, California. Upon said examination it was determined by said Commisisoner of Internal Revenue that

plaintiff could not include the taxes, escrow fees, recording costs, and other related expenses hereinabove specified in the basis (unadjusted) of properties sold in 1944 and 1945. Said amounts were excluded from the basis (unadjusted) of said properties by said Commissioner.

#### XVII.

As a result of the determinations described in the immediately preceding paragraph XVI, said Commissioner of Internal Revenue assessed additional income taxes against plaintiff in the amounts of \$162.01 for the calendar year 1944 and \$1,021.24 for the calendar year 1945. In addition, said Commissioner assessed additional personal holding company surtax against plaintiff in the amount of \$4,479.70 for the calendar year 1944.

#### XVIII.

On or about September 16, 1947, plaintiff paid to the Collector of Internal Revenue for the Sixth District of California at Los Angeles, California, all of said amounts assessed as described in the immediately preceding paragraph XVII, the total of said assessments paid being \$5,662.95, together with interest thereon.

#### XIX.

On or about September 6, 1949, plaintiff filed with the Collector of Internal Revenue for the Sixth District of California, at Los Angeles, California, claims for refund of taxes for the calendar years 1944 and 1945 in the following amounts:

Year	Type of Tax	Amount
1944	Income tax . . . . .	\$145.63
	(plus interest from March 15, 1945)	
1944	Personal Holding Company Surtax . . . . .	\$3,264.41
	(plus interest from March 15, 1945)	
1945	Income Tax . . . . .	\$1,021.24
	(plus interest from March 15, 1946)	

XX.

On or about July 10, 1950, the Commissioner of Internal Revenue mailed to plaintiff by registered mail a notice of disallowance of said claims for refund and each of them.

XXI.

Plaintiff's complaint herein for recovery of said taxes was filed on July 25, 1950.

Conclusions of Law

I.

Both the plaintiff and the Commissioner of Internal Revenue clearly made a mistake of law when the deductions referred to in paragraphs III, V, VII, IX and XI of the foregoing Findings of Fact were made and allowed, after audit by the Commissioner of Internal Revenue.

II.

The statute of limitations has long since run against the defendant with respect to any attempt to collect the tax attributable to the wrongly de-

ducted items enumerated in said paragraphs III, V, VII, IX and XI of the foregoing Findings of Fact.

### III.

Sections 3770(a)(2) and 3775(a) of the Internal Revenue Code preclude any attempt by the defendant to collect the tax attributable to said wrongfully deducted items after the statute of limitations has run, by offset, counterclaim or [48] recoupment.

### IV.

Plaintiff was not estopped from including said wrongfully deducted items in the basis (unadjusted) of the properties to which they related in measuring gain or loss realized on sale of said properties in 1944 and 1945.

### V.

Plaintiff has overpaid its federal income tax and personal holding company surtax, with interest thereon, for the calendar year 1944 in the amount of \$3,921.55, and its federal income tax, with interest thereon, for the calendar year 1945 in the amount of \$1,113.15.

### VI.

Claims for refund were duly filed by plaintiff for the recovery of said taxes and interest overpaid as aforesaid within the time prescribed by law. Said claims for refund having been denied by defendant, this action for recovery of said overpayments, together with interest thereon, was timely filed.

VII.

Plaintiff is entitled to recover from defendant the amount of \$5,034.70, together with interest thereon at the rate of six per cent per annum from September 16, 1947, to a date preceding by not more than thirty days the date of the refund check in payment thereof.

Dated: Oct. 7th, 1952.

/s/ PEIRSON M. HALL,  
District Court Judge.

Approved as to Form:

WALTER S. BINNS,  
United States Attorney;

E. H. MITCHELL, and  
EDWARD R. McHALE,  
Ass't U. S. Attorneys;

EUGENE HARPOLE, and  
FRANK W. MAHONEY,  
Special Attorneys, Bureau of  
Internal Revenue.

By /s/ EDWARD R. McHALE.

[Endorsed]: Filed Oct. 7, 1952. [49]

In the District Court of the United States in and  
for the Southern District of California, Central  
Division

No. 11960-PH

THE ALBERTSON COMPANY, a Corporation,  
Plaintiff,

vs.

UNITED STATES OF AMERICA,  
Defendant.

**JUDGMENT FOR PLAINTIFF FOR FEDERAL  
INCOME TAX AND PERSONAL HOLDING  
COMPANY SURTAX OVERPAID**

Plaintiff herein having filed its complaint for recovery of federal income tax and personal holding company surtax overpaid for the calendar years 1944 and 1945 in the total amount of \$4,431.28, plus interest thereon as provided by law; the defendant having filed its answer to said complaint; the parties having submitted a complete written Stipulation of Facts and written briefs in support of their respective contentions; the Court having entered herein its Findings of Fact and Conclusions of Law wherein it is found that plaintiff is entitled to recover the full amount prayed for in its complaint.

It Is, Therefore, Ordered, Adjudged and Decreed that plaintiff recover from defendant on account of federal income taxes overpaid for the calendar years 1944 and 1945, and personal holding company surtax overpaid for the calendar year 1944, the sum



of \$5,034.70, together with interest thereon at the rate of six per cent per annum from September 16, 1947, to a date preceding by not more [50] thirty days the date of the refund check in payment thereof.

Dated: Oct. 7th, 1952.

/s/ PEIRSON M. HALL,  
District Court Judge.

Approved as to Form:

WALTER S. BINNS,  
United States Attorney;

E. H. MITCHELL, and  
EDWARD R. McHALE,  
Ass't U. S. Attorneys;

EUGENE HARPOLE, and  
FRANK W. MAHONEY,  
Special Attorneys, Bureau of  
Internal Revenue.

By /s/ EDWARD R. McHALE.

[Docketed and entered]: Oct. 8, 1952.

[Endorsed]: Filed Oct. 7, 1952. [51]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE COURT OF  
APPEALS FOR THE NINTH CIRCUIT

Notice Is Hereby Given that the defendant, United States of America, hereby appeals to the Court of Appeals for the Ninth Circuit from the final judgment in the above-entitled case against defendant and in favor of plaintiff, which judgment was entered October 8, 1952.

Dated: December 5, 1952.

WALTER S. BINNS,  
United States Attorney;

E. H. MITCHELL, and  
EDWARD R. McHALE,  
Ass't U. S. Attorneys;

EUGENE HARPOLE, and  
FRANK W. MAHONEY,  
Special Attorneys, Bureau of  
Internal Revenue.

/s/ EDWARD R. McHALE,  
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Dec. 5, 1952. [52]

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[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

The defendant, United States of America, hereby states that it intends to rely on appeal on the following points:

1. The District Court erred in adopting the ruling entered in its minutes August 15, 1952.

2. The District Court erred in adopting the findings of fact and conclusions of law filed October 7, 1952.

3. The District Court erred in adopting the judgment, docketed and entered on October 8, 1952.

Dated: February 24, 1953.

WALTER S. BINNS,  
United States Attorney;

E. H. MITCHELL, and  
EDWARD R. McHALE,  
Ass't U. S. Attorneys;

EUGENE HARPOLE, and  
FRANK W. MAHONEY,  
Special Attorneys, Bureau of  
Internal Revenue.

/s/ EDWARD R. McHALE,  
Attorneys for Defendant-  
Appellant.

[Endorsed]: Filed Feb. 24, 1953. [54]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF  
RECORD ON APPEAL

The defendant, United States of America, designates the complete record and all the proceedings

and evidence included in the record on appeal, as follows:

1. Complaint and Summons, dated July 26, 1950;
2. Stipulation and Order Extending Time to Appear, dated October 4, 1950;
3. Stipulation and Order Extending Time to Appear, dated December 5, 1950;
4. Stipulation and Order Extending Time to Appear, dated January 15, 1951;
5. Answer of Defendant, United States of America, filed February 14, 1951;
6. Stipulation of Facts, filed April 7, 1952;
7. Minutes of the Court, dated August 15, 1952;
8. Findings of Fact and Conclusions of Law, filed October 7, 1952; [55]
9. Judgment for plaintiff for Federal Income Tax and Personal Holding Company Surtax Overpaid, filed October 7, 1952, docketed and entered October 8, 1952;
10. Notice of Appeal to the Court of Appeals for the Ninth Circuit, filed December 5, 1952;
11. Order Extending Time to Docket Cause on Appeal, dated and filed January 13, 1953;
12. Statement of Points on Appeal; and

13. This Designation of Contents of Record on Appeal.

Dated: This 24th day of February, 1953.

WALTER S. BINNS,  
United States Attorney;

E. H. MITCHELL, and  
EDWARD R. McHALE,  
Ass't U. S. Attorneys;

EUGENE HARPOLE, and  
FRANK W. MAHONEY,  
Special Attorneys, Bureau of  
Internal Revenue.

/s/ EDWARD R. McHALE,  
Attorneys for Defendant-  
Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Feb. 24, 1953. [56]

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[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET  
CAUSE ON APPEAL

Upon motion of defendant-appellant, and good cause appearing therefor:

It Is Hereby Ordered that the time within which to file the record and docket the above-entitled cause in the United States Court of Appeals for the Ninth

Circuit be, and the same is hereby, extended to and including the 5th day of March, 1953.

Dated: This 13th day of January, 1953.

/s/ LEON R. YANKWICH,  
United States District Judge.

Presented by:

/s/ EDWARD R. McHALE,  
Asst. United States Attorney.

Affidavit of service by mail attached.

[Endorsed]: Filed Jan. 13, 1953. [58]

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[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 59, inclusive, contain the original Complaint for Refund of Income Taxes and Personal Holding Company Surtax; Summons; Three Stipulations and Orders Extending Time to Appear; Answer; Stipulation of Facts; Findings of Fact and Conclusions of Law; Judgment for Plaintiff for Federal Income Tax and Personal Holding Company Surtax Overpaid; Notice of Appeal; Statement of Points on Appeal; Designation of Record on Appeal and Order Extending Time to Docket Appeal and a full, true and correct copy of



The United States Court of Appeals  
for the Ninth Circuit

No. 13,734

UNITED STATES OF AMERICA,

Appellant,

vs.

THE ALBERTSON COMPANY, a Corporation,

Appellee.

APPELLANT'S DESIGNATION OF RECORD  
NECESSARY FOR CONSIDERATION ON  
APPEAL AND TO BE PRINTED

Pursuant to Rule 19 (6) of this Court, appellant hereby designates the following parts of the record as being necessary for consideration of the points upon which it intends to rely on this appeal, and desires to have printed, omitting the title of Court and cause from each of the documents designated for printing:

1. The complete record certified by the Clerk of the District Court to the Court of Appeals [pages 1-58].
2. The District Court Clerk's certification of Record on Appeal.
3. This Designation of Record Necessary for Consideration on Appeal and to be Printed.



4. Statement of Points Upon Which Appellant Intends to Rely on Appeal [Court of Appeals].

Dated: This 6th day of March, 1953.

WALTER S. BINNS,  
United States Attorney.

E. H. MITCHELL and  
EDWARD R. McHALE,  
Assts. United States Attorney.

/s/ EDWARD R. McHALE,  
Attorneys for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed March 7, 1953.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH  
APPELLANT INTENDS TO RELY ON  
APPEAL

Pursuant to the provisions of Rule 19 (6) of the Rules of the United States Court of Appeals for the Ninth Circuit, appellant hereby adopts its Statement of Points on Appeal, which was filed in the District Court, as its statement of the points upon which it intends to rely in this Court.

Dated: This 6th day of March, 1953.

WALTER S. BINNS,  
United States Attorney.

E. H. MITCHELL and  
EDWARD R. McHALE,  
Assts. United States Attorney.

/s/ EDWARD R. McHALE,  
Attorneys for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed March 7, 1953.